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Supreme Court of the United States

OCTOBER TERM, 1970

No. 776

ROBERT R. RODICKER,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the above entitled cause on June 8, 1970 and the order of said court overruling a suggestion of error on July 2, 1970.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court of Mississippi was rendered on June 8, 1970 and is printed in Appendix A hereto, *infra*, page 15. At the time of printing of this petition, the opinion had not been printed in the Southern Reporter.

The decision of the Supreme Court of Mississippi overruling the petition for rehearing and denying a rehearing, thus making its judgment final, dated July 2, 1970 was handed down without written opinion, but an order was entered denying said petition, which order is printed herein as Appendix B.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28 of the United States Code, chapter 81, Section 1257(3). Rule 19, 1(a) of the Revised Rules of the Supreme Court of the United States governs the class of case presented here.

The Federal statute involved here is the Federal Employers' Liability Act, 45 United States Code Annotated, Section 51, page 180, which reads as follows, to-wit:

> "Section 51. Liability of Common Carriers by Railroad in interstate or foreign commerce for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate of foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

The judgment of the Supreme Court of Mississippi was rendered on June 8, 1970. A petition for rehearing was timely filed and the petition was overruled and a rehearing denied on July 2, 1970. A copy of the judgment is attached to this petition as Appendix A.

QUESTIONS PRESENTED.

The major question presented here is whether the petitioner at the time of his injuries was an employee of the Illinois Central Railroad Company entitling him to the coverage of the Federal Employers' Liability Act for the injuries he sustained on duty.

Secondly, if it cannot be said as a matter of law that at the time of Petitioner's injuries he was an employee of the Illinois Central Railroad within the meaning of the Federal Employers' Liability Act, then was he entitled to have a jury determine the issue of employment.

STATUTE INVOLVED.

There is here involved the Federal Employers' Liability Act, Section 51, Title 45, United States Code Annotated.

STATEMENT OF CASE

The Illinois Central Railroad Company along with other railroad companies, operated passenger trains into and out of the city of New Orleans, Louisiana for many years. For its own convenience the Illinois Central Railroad Company, hereinafter referred to as Respondent, along with other railroads operating passenger trains in the New Orleans, Louisiana area, entered into an agreement with the New Orleans Union Passenger Terminal whereby the New Orleans Union Passenger Terminal agreed to construct and maintain a passenger terminal facility in the city of New Orleans to switch Respondent's trains and the trains of other railroads with crews to be made up from the switching crews of the various railroads operating passenger trains into and out of the New Orleans Union Passenger Terminal. It was while the Petitioner, an Illinois Central switchman, was switching one of the Illinois Central Railroad passenger trains that he received his injuries.

The Petitioner brought suit against the Illinois Central Railroad Company in the Circuit Court of Scott County, Mississippi. A jury was impaneled, and the case came on for trial on June 24, 1968. At the conclusion of all of the evidence, Respondent made a motion for a directed verdict on the basis that the Petitioner was not, at the time of his injuries, an employee of the Illinois Central Railroad Company and, therefore, was not entitled to bring an action under the Federal Employers' Liability Act against the Respondent, which motion was sustained by the trial judge.

After the dismissal of his suit in the Circuit Court of Scott County, Mississippi, Petitioner appealed the trial court's decision to the Supreme Court of the State of Mississippi, and the

Supreme Court of the State of Mississippi affirmed the decision of the Circuit Court of Scott County, Mississippi, thus this petition for writ of certiorari.

It is the contention of Petitioner, first, that the trial court should have, as a matter of law, instructed the jury that the Petitioner was an employee of the Illinois Central Railroad Company at the time of his injuries; secondly, that if the Circuit Court was not convinced that the Petitioner was an employee of the Illinois Central Railroad Company, then it should have submitted to the jury the question of employment; and thirdly, that the New Orleans Union Passenger Terminal was an agent of the Illinois Central Railroad Company, to whom the Respondent could not delegate its duty to the Petitioner under the Federal Employers' Liability Act to exercise reasonable care to furnish a safe place to work. The place furnished Petitioner to work was not safe, and the Respondent knew of the dangerous conditions which brought about the Petitioner's injuries and had known of these conditions for a long time without taking reasonable steps to correct the unsafe conditions.

The Petitioner, when he was injured on September 16, 1964, was twenty-three years of age. He has only an eighth grade education and has done nothing but heavy manual labor for a livelihood (R.8). He hired out on the Respondent railroad on November 11, 1959 at the age of eighteen years and continued to work for the Respondent from that time until he was injured (R.9). He worked in various freight yards for the Respondent during that period of time, all in the city of New Orleans, Louisiana, including Respondent's yards known as Poydras Yard, Stife Docks, Mayes Yard, Harahan Yard and the Levee Yard; and occasionally worked at the New Orleans Union Passenger Terminal (hereinafter called the U.P.T.), (R.9). He

had an I.C. employee number; he held no seniority on the U.P.T. which did not even have a seniority roster for switchmen (R.12). When Petitioner worked on occasions over at the U.P.T. he took his orders from a switchman who held seniority on the I.C. just as the Petitioner did, and who was known in the switching industry as an engine foreman, and such was the case on the day that Petitioner received his injuries (R.5). Petitioner believed the engine foreman to be an Illinois Central employee, and it was the engine foreman who directed the Petitioner in his switching work at the U.P.T. (R.5). Appellant received his pay by check drawn on the I.C. for work which he did at the U.P.T. (R.12).

When Petitioner applied for the particular job on which he was injured, he applied to a Board Clerk or call boy for the I.C. Eighty percent of Petitioner's work during his career as a railroad switchman for the I.C. was done in other yards where he handled freight cars (R.8). He applied for his vacation to the I.C. each year (R.4), and he received his vacation pay from the I.C. When he wanted a leave of absence, he applied to the I.C. (R.4), and at the time of his injuries, he was making up I.C. Train No. 1, the City of New Orleans, which operates between Chicago, Illinois and New Orleans, Louisiana (R.4).

While working over at the U.P.T., Petitioner remained under the rules and instructions of the I.C. (Page 2 of Exhibit 2, Book of Rules of U.P.T., to the testimony of C. J. Wallace, Terminal Manager—R. 249.)

After Petitioner's injuries and a period of hospitalization, he returned to work for I.C. on a trial basis, Most of his work consisted of handling freight cars for the I.C. (R. 25). Because of his disability, he was unable to continue in this work.

The negligence charged against the railroad in Petitioner's suit was the suffering, allowing and permitting the use of an engine which emitted excessive sparks from its smoke stack and the suffering, allowing and permitting large steel garbage containers to be left so close to the railroad track that a switchman riding on a car or engine along the track could not clear the garbage container and would come in contact therewith. The switchmen had complained to the railroad about this dangerous practice which had existed over a period of fourteen years, (R. 187).

Petitioner was injured as a result of his head coming in contact with one of the large steel garbage containers alongside the railroad track, which container struck him in the head causing his serious injuries while he was riding out of one of the U.P.T. tracks on the steps of a diesel locomotive.

REASONS FOR GRANTING WRIT.

The Petitioner's entire cause of action has been aborted by the Supreme Court of Mississippi. This is not a case where a reversal is sought to merely rectify an error in the administration of the Federal Employers' Liability Act, or to disturb a finding of fact with regard to negligence questions under the Act. Here the state court has refused to allow a trial by jury to the Petitioner and has denied the very coverage of the Act to the Petitioner. The basis of the court's opinion is found in the authorities relied on therein.

Petitioner brought his action within the three year statute of limitations against the Respondent under the FELA. If it is held that the U.P.T. was his employer, he cannot bring an action against the U.P.T. as more than three years have elapsed since his injuries.

The interpretation of the Federal Employers' Liability Act is a matter of Federal law and Federal decisions are controlling. *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), and it has been said by this Court:

> "The decisions of this court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair minded men cannot honestly differ where the fault of the employer played any part in the employee's injury. Special and important reasons for the granting of certiorari in these cases are certainly present when lower Federal and State Courts persistently deprive litigants of their right to a jury determination."
>
> *Rogers v. Missouri Pacific Railroad Co.*, 320 U.S. 500, 77 S.Ct. 443 (1957).

The Supreme Court of Mississippi has always given a markedly restricted interpretation to the coverage of the Federal Employers' Liability Act and to the questions of employment in interstate commerce regardless of Federal decisions to the contrary. *Gulf M. & N. Railroad Co. v. Myer*, 145 Miss. 555, 110 So. 444 (1926). Further erosion of the principles above referred to was done at the hands of the court in the cases of *James O. Wallace v. St. Louis-San Francisco Railway Co.*, 120 So.2d 131 (1960); and *James E. Hill v. Gulf, Mobile & Ohio Railroad Company*, 120 So.2d 157 (1960).

The Supreme Court of the State of Mississippi is a court of last resort and its erroneous decision in this case may be properly cited as authority construing the Federal statute, unless this writ be granted. The decision is contrary to the decisions of the various United States Courts of Appeals and the decisions of the United States Supreme Court.

On the legal question of whether Petitioner was an employee of the Illinois Central Railroad Company at the time of his injuries, the leading case in point is *Terminal Railroad Association of St. Louis v. Fitzjohn*, 165 F.2d 473 (1948), which has never been overruled. In that case the injury occurred on the premises owned by another, viz. United States Government Ordnance Plant. The government owned the switch engine being used at the time of Plaintiff's injuries. The defendant railroad furnished the crew to man the engine, and members of the crew belonged to the Brotherhood which had the usual union contract with the railroad defendant. At the beginning of each day's work the crew received their instructions from the plant officials as to what cars were to be moved, and during the course of a working day, frequently the plant employees directed the crew to move cars from one place to another in the plant. There the defendant posted the job on its bulletin board, and the posting amounted to a notice to its employees that the job or assignment was open to be bid in or chosen by the employees requesting it who had the highest seniority, and it was generally understood that all the employees who may be assigned to this job would have all of their rights and benefits as employees of the defendant preserved. The switching crew was subject to the rules and working conditions applicable to defendant's other employees. Also, in that case, the defendant railroad paid the plaintiff his wages and the United States Government reimbursed the railroad for the payment of such wages. In that case, as in the case at bar, the plaintiff did not know of any agreement between the defendant railroad and the government that the government would have complete authority over the switching crew during the performance of its work except for such inference as may have been drawn from the actual practice followed in the giving of daily instruction by plant officials carrying out the switching work in the plant. In

that case the court instructed the jury as a matter of law that the plaintiff was an employee of the defendant railroad. We see no distinction between that case and the case at bar. *Terminal Railroad Association of St. Louis v. Fitzjohn*, 165 F.2d 473 (1948).

The latest case in point supporting the proposition that as a matter of law the Petitioner was an employee of Respondent at the time of his injuries is *Missouri-Kansas-Texas Railway Company v. Hearson*, 422 F.2d 1037 (1970). The opinion of the United States Court of Appeals, Tenth Circuit, in that case read in part as follows:

> "The facts are these. Oscar Hearson began working for the Katy in the early 1940's. From time to time his position with the Katy changed, and eventually he became a car-cleaner. This was his job with the railroad when, in 1957, it became necessary for the railroad to lay off a large number of men. Appellee was among the men laid off because at that time the Katy ceased doing its own car-cleaning and contracted it out. The Katy then contracted with one John Souter to do the car-cleaning previously done by the Katy's employees, including appellee, at the railroad's Parsons, Kansas yards. The contract was for an indefinite term subject to termination only upon 30 days notice by either party."

In that case Souter hired other laborers as well as Hearson to do the car-cleaning, and Hearson did the same work as he had done previously for the railroad. Souter paid his wages and withheld taxes and social security. Souter also provided the car-cleaning employees with brooms and shovels, trucks and a front end loader which he used to haul away debris accumulated after the railroad cars were cleaned. Hearson worked for Souter from 1958 until he was injured in 1966 while

attempting to open a car door on one of the Katy's cars. The court in holding that at the time of his injuries Hearson was an employee of the railroad concluded:

> "That the Katy did not supply the cleaning tools is of little importance since the required tools were so simple. Although Souter paid appellee Hearson's wages, this too is of little importance since the trial judge correctly determined that in these circumstances the car-cleaning contract which provided that Souter pay the car-cleaners' wages appears as an attempt to avoid the Federal Employers' Liability Act and is void under 45 U.S.C. §55.
>
> After considering the elements of control, the trial judge ruled as a matter of law that Hearson was an employee of the Katy subject to their right of control. We agree with the trial judge that under the undisputed evidence in the case it is an inescapable conclusion that Hearson was an employee of the railroad company within the purpose and spirit of the Federal Employers' Liability act.
>
> Affirmed."

Missouri-Kansas-Texas Railway Company v. Hearson, 422 F.2d 1037 (1970).

The case authority relied upon by the trial judge in the case at bar was cited in his opinion, *Shaw v. Monnassen Southwestern Railway Co.*, 200 F.2d 841, but in that case the employee was held not to be engaged in interstate commerce at the time of his injuries; whereas, in the case at bar there is no question regarding engagement in interstate commerce. In a later case, the same court that decided *Shaw* had before it a case identical on the facts and which occurred in the same steel plant in the same railroad operation as *Shaw* and involved another railroad brakeman, and the court held that whether the brakeman was an employee of the steel company or an

employee of the Monnassen Railroad was a question for the jury. *Valo v. Monnassen S. W. R. Co.*, 407 F.2d 1400 (1969).

If Petitioner be mistaken that it can be said as a matter of law that he was an employee of Respondent at the time of his injuries, then it is submitted that the issue of employment should have been submitted to the jury. *Baker v. T. P. Railroad Co.*, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed. 2d 756 (1959).

There is authority to the effect that when the Respondent decided to stop performing the service of switching its own passenger trains at its own terminal and to use the tracks, locomotives and other facilities of the U.P.T., it thereby elected the U.P.T. its agent and is responsible for any negligent act by employees of the U.P.T. *Sinkler v. Missouri Pacific Railroad*, 78 S.Ct. 758, 356 U.S. 326 (1958).

In the *Sinkler* case plaintiff was employed by the Missouri Pacific Railroad as a cook on the private car of Missouri Pacific's General Manager. He was working on the car when a switching crew employed by the Houston Belt & Terminal Railway Company (hereinafter referred to as the Belt Railway) undertook to switch the car from one track to another in the union station in Houston, Texas. Through the fault of the switching crew, the car was caused to violently collide with another car in the station, and the plaintiff was injured as a result thereof. The plaintiff recovered judgment against the Missouri Pacific in an action brought under the Federal Employers' Liability Act, but the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas reversed, on the ground that the FELA did not subject the MOP to liability for injuries of its employees caused by the fault of an employee of the Belt Railway and applied the general rule that the doctrine

of respondeat superior does not extend to independent contractors and concluded that since the evidence was insufficient to show that the Missouri Pacific exercised control over the details of the Belt Railway's operations, the fault of its switching crew was not imputable to the respondent, but the United States Supreme Court granted certiorari and reversed the Supreme Court of Texas which had denied the employee's application for writ of error. The court held in part:

> "[8] It is manifest that the corporate autonomy of the Belt Railway, and its freedom from detailed supervision of its operations by respondent, are irrelevant inasmuch as the switching crew of the Belt Railway Company at the moment of the collision in the station was engaged in furthering the operational activities of respondent. We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of §1 of FELA."

Sinkler v. Missouri Pacific Railroad, 78 S.Ct. 758, 356 U.S. 326 (1958).

The decision in the case at bar is in conflict with the decisions of the United States Supreme Court on a matter of Federal law of great importance to employees of railroads throughout this country.

Undue and unusual hardship will result to the Petitioner if certiorari be not granted. It has been six years since the Petitioner sustained his serious injuries, and the overwhelming weight of the testimony reveals that he is permanently disabled to return to the work of a railroad switchman and has been unable to earn any wages at any type of work. He is a young man and has been greatly damaged, and after six years of

litigation still has not had his case submitted to a jury for a decision, the most basic right granted to him by the Federal Employers' Liability Act.

CONCLUSION.

For the foregoing reasons and to enable the accomplishment of a clear interpretation of the coverage of the 1939 amendment to the Federal Employers' Liability Act and to enable the accomplishment of justice under the law, this Petition for Writ of Certiorari should be granted.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Mississippi, commanding said court to certify and send to this court, a transcript of the record in the case entitled *Robert R. Rodicker v. Illinois Central Railroad Company*, No. 45,849, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this court and the judgment of the Supreme Court of Mississippi be reversed here, and the cause remanded for a new trial.

Respectfully submitted,

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APPENDIX "A".

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,849

ROBERT R. RODICKER

versus

ILLINOIS CENTRAL RAILROAD COMPANY

SMITH, JUSTICE:

Robert R. Rodicker, as plaintiff, began the action out of which this appeal arose in the Circuit Court of Scott County against Illinois Central Railroad Company under the provisions of the Federal Employers' Liability Act. In his declaration Rodicker alleged that he was entitled to recover damages for personal injuries sustained in the course of his employment by the railroad company and because of its negligence.

At the conclusion of all of the evidence, the trial court, on motion, peremptorily directed the jury to find for the defendant upon the ground that Rodicker was not the servant or under the supervision, direction or control of Illinois Central Railroad Company but, at the time of his injury, was the servant and under the supervision, direction and control of New Orleans Union Passenger Terminal and in the performance of his duties for the latter.

On appeal, Rodicker challenges the correctness of the trial court's action in refusing to submit the case to the jury and in entering judgment for appellee because, (1) the jury should have

been instructed that he was a servant of Illinois Central at the time of his injury or (2) there was a factual issue as to that proposition or (3) New Orleans Union Passenger Terminal was an agent of Illinois Central at the time and liability thus was imposed under the Federal Employers' Liability Act.

New Orleans Union Passenger Terminal (for the sake of brevity referred to as UPT), is a railroad, created and operating under an amendment to the Constitution of the State of Louisiana, Article 14, Section 31.3, Act 385 (1938). It is owned and operated by the City of New Orleans. UPT operates in interstate commerce, is subject to the rules of the Interstate Commerce Commission, may sue and be sued, and is governed by a board of directors. It owns tracks and railroad equipment, and has about 275 employees. Its function, for the City of New Orleans, is to operate a passenger terminal and it contracts with the six railroads operating passenger trains serving that city, namely, Kansas City Southern, Texas & Pacific, Southern, Southern Pacific, Louisville & Nashville, and Illinois Central, to receive, service and "break up and make up" passenger trains arriving at or departing from the City of New Orleans.

Under an agreement with the Brotherhood of Railroad Trainmen, yardmen for the switching or operating crews of UPT's switch engines come from rosters of all of these six railroads. Each of the six is allocated a certain number of UPT jobs under a formula or quota. These jobs are applied for, "claimed," or "bid" for by the employees of the several roads on the basis of their seniority with their respective "home roads."

The work of the terminal is done by these yardmen, such as Rodicker, each of whom obtains his job with UPT in this

manner. These men work in the UPT yard under the exclusive supervision, direction and control of UPT, acting through its yardmaster. None of the six railroads exercised, attempted to exercise, or retained any right of supervision or control of these employees in the performance of their work for UPT. Under the plan, a three man switching crew might consist of men who had come from the same or from different "home roads" and its actual composition, at any particular time, in this respect, was coincidental.

The Illinois Central was Rodicker's "home road." He had bid, claimed or applied for, and had obtained the particular job with UPT on which he was injured, under the seniority rule. On the night of his accident, he had begun work at about 11:55 P.M. At that time, he reported for duty at the switching shanty in the UPT yard. He was the "helper" on UPT Job Number 5. As it happened, the other members of the crew were an engineer and an engine foreman whose home road also was the Illinois Central and who had obtained their jobs with UPT on the basis of seniority with their home road. It was the job of this crew to operate UPT's Switch Engine Number 3. The UPT yardmaster, who issued orders and was in control of operations, was an employee who had worked for UPT since its inception. Between 11:55 P.M. when Rodicker began his tour of duty and 2:30 A.M. when the accident occurred, the crew of which Rodicker was a member, operating UPT Engine Number 3, had switched trains of several roads, including L & N and Southern Pacific. According to Rodicker, the accident occurred in the following manner. UPT's Switch Engine Number 3 was backing out after having finished coupling an Illinois Central car to a train, and Rodicker was "on board the trailing end of the engine for the purpose of climbing the steps to the platform for a place of safety while riding out of said track, but in the process of

climbing the steps and before he could reach the platform an enormous amount of sparks were being emitted from the smoke stack on the diesel engine. They began to burn his neck and his hands so that he was moving away from the sparks and in doing so and while leaning out from the steps of the engine and holding onto the handrails of the engine, his head and shoulder struck a large steel garbage container which knocked appellant from the engine onto the rail of the tracks, rendering him unconscious, and in which accident he sustained serious and permanent injuries, and from which injuries he had been rendered permanently and totally disabled. The negligence charged against the railroad in appellant's suit was the suffering, allowing and permitting the use of an engine which emitted excessive sparks from its smoke stack and the suffering, allowing and permitting of large steel garbage containers to be left so close to the railroad track that a switchman riding on a car or engine along the track could not clear the garbage container and would come in contact therewith; and switchmen had complained to the railroad about the dangerous practice of leaving the garbage disposal units too close to the track. The dangerous practice of which the railroad company had notice, or by the exercise of reasonable care should have had notice, that existed in regard to the garbage containers being left too close to the track, had existed for a period of fourteen years."

In support of Rodicker's contention that, at the time of his injury, he was a servant of Illinois Central, he cites the practice of the six railroads and UPT, in cases where UPT's employment of a man was for a period of less than 30 days only, of permitting him to draw pay for the UPT work from his home road. Under this practice in such cases, the home road advanced to the employee the amount due for his UPT work, then billed UPT for it and was reimbursed by UPT. Obviously,

this is a payroll procedure for the convenience of all concerned and was designed to simplify bookkeeping and to obviate the need for transferring on the books the names of employees where the period of employment by UPT was of brief duration. In no way does it alter the basic fact that, in the last analysis, the man's pay for his work at UPT comes from UPT and not from Illinois Central.

Rodicker cites *Baker v. Texas & Pacific Railway Company*, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed. 2d 756 (1959) in support of the proposition that the trial court should have allowed the case to go to the jury upon the question as to whether he was or was not the servant, and Illinois Central the master, upon the occasion of his injury. In *Baker*, an employee of Nichols Company had been engaged to do work along the main line of the Texas & Pacific on the right-of-way. The trial court held, as a matter of law, that Baker was not an employee of the railroad at the time of his death. On certiorari, the United States Supreme Court found that there was evidence tending to show that Baker was working on a "task of the railroad," under the direct supervision and control of a supervisor employed by the railroad, and, there having been countervailing evidence as to this, the question should have been submitted to a jury.

In *Baker* the United States Supreme Court said:

> Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad; that the road furnished the materials to be pumped into the roadbed; *and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed* by the individual workmen, including the precise point where the mixture should be pumped, when

they should move to the next point, and the consistency of the mixture. (Emphasis added).

Rodicker also cites *Terminal Railroad Association v. Fitzjohn*, 165 F.2d 473, 1 A.L.R. 2d 290 (8th. Cir. 1948). In that case Terminal Railroad Association was serving its customer, an ordnance plant operated by the United States Government. The court, on the evidence, held that Fitzjohn had remained an employee of the railroad and had not become a loaned servant of the United States.

In *Fitzjohn*, the work being done was in furtherance of service being rendered by the single railroad to its customer and, the customer did no more in a supervisory way than is usual in such a relationship in directing what cars should be moved and the operation remained one of the railroad in charge of one of its regular crews. The railroad was reimbursed by the customer for the expense of the crew's salary in lieu of a fee which the railroad had previously required. As the court observed under the arrangement in *Fitzjohn* it "contemplated no change in the employment status of the plaintiff or of other members of the switching crew and no deprivation of any of their rights or benefits as employees of the defendant. . . ."

St. Louis-San Francisco Railway Company v. Porter, 211 So.2d 530 (Miss. 1968), was a case which involved a suit by Porter's administratrix against the railroad under the Federal Employers' Liability Act. It was alleged that Porter had been an employee of the railroad company at the time of his fatal injury. There was a verdict for the plaintiff. This Court reversed upon the ground that Porter had not been an employee of the defendant railroad when he had been fatally injured. Porter was a switchman employed by another railroad, the Union Railroad

Company, in Memphis, Tennessee. Union Railroad Company was Porter's general employer. The Court said: "On the night of the accident, a Union Railroad Company switching group, of which Porter was a member, was directed by the Union yardmaster to transfer a string of 39 cars assembled in the Union yard to the Frisco yard." The crew constituted regular Union Railroad Company employees. The cars were taken to Frisco yard pursuant to these directions and somehow, Porter was killed. The trial court peremptorily directed the jury that Porter was an employee of Frisco at the time of his death. On appeal, Porter's administratrix contended that at the time of his death Porter had been a "loaned servant" to the Frisco. This Court rejected that contention and stated "it is clear that Union retained control of its own train crew...." The opinion in Porter contains an extended discussion of the issue. It is clear from the opinion, and from the many authorities there cited, that it is the well established rule that the determination of the question as to who is the master of a servant depends in large measure upon the facts showing under whose supervision and control the injured servant is working at the time of injury.

The United States Supreme Court spelled out the "loaned servant" doctrine in *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480, (1909). The case was not brought under the Federal Employers' Liability Act, but the rule there laid down has been adverted to and followed in a number of subsequent decisions which did involve the Federal Employers' Liability Act.

In *Robertson v. Yazoo & M. V. R. Co.*, 159 F.2d 31 (5th Cir. 1947) the Court of Appeals for the Fifth Circuit referred to the *Standard Oil* case, *supra*, and said:

The opinion in Standard's case, one of those cases in which the opinion, because of the clear, comprehensive and authoritative way in which it sets out the controlling principles is not just another opinion but a landmark for federal and state courts in the field of law with which it deals, general and special servantship, puts the matter in a nutshell:

> "... One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.
>
> "... The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it."

In *Porter, supra*, this Court cited and discussed *Hull v. Philadelphia & Reading Railway Company*, 252 U.S. 475, 40 S.Ct. 358, 64 L.Ed. 670 (1920) and *Linstead v. Chesapeake & Ohio Railway Company*, 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928).

Both of these cases involved the "loaned servant" rule. In the *Porter* case this Court said of the decision in *Hull, supra*.

> These rules were applied in Hull v. Philadelphia & Reading Railway Company, 252 U.S. 475, 40 S.Ct. 358, 64 L.Ed. 670 (1920). Hull was in the general employ of Western Maryland Railway Company in Pennsylvania, which connected with the Philadelphia and Reading Railway and ran into another city. Through freight trains were operated from the WM to the P&R. Hull was a

brakeman on a WM train which was to run over the tracks of the P&R. Before starting, the WM crew received instructions from the P&R yardmaster as to operation of the train, including directions to pick up seven cars at a certain town. While the WM crew was getting these cars on the P&R track, Hull was killed. . . . Affirming a directed verdict for the P&R, the Court said:

[I]n the Employers' Liability Act Congress used the words "employe" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employe. The simple question is whether, under the facts as recited and according to the general principals applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. . . . It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer.

. . . .

Linstead v. Chesapeake & Ohio Railway Company, 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928), . . . [the Court] affirmed a jury finding that the injured plaintiff was a loaned employee of the Chesapeake & Ohio Railway Company. Linstead's general employer was the Big Four Railroad. There was a thirteen-mile stretch of C&O track below Cincinnati into Kentucky, as to which the two railroads made an arrangement for Big Four to lend to the C&O a locomotive, caboose and train crew to transfer freight trains to the Big Four over the rails of the C&O. . . . When traveling over this thirteen-mile stretch, the Big Four train crew was furnished with time tables and rule books of the C&O and was under the actual supervision and control of its trainmaster. The Big Four locomotive was pulling a train of cars over this stretch of the C&O when it was run into by a C&O train, causing Linstead's death.

> . . . [In distinguishing the case from *Hull, supra*, the Court said, . . . that Linstead and his crew were doing the work of the C&O transporting the cars over the thirteen-mile stretch, under the rules of the C&O and the immediate supervision and direction of its trainmaster in charge of trains of this stretch of the C&O, track. For this period there was a transfer of the relation of Linstead from the general employment of Big Four to a special employment by C&O. In contrast, [at the time of his injury], Hull was doing the work of the WM and for its benefit. The mere transfer of the WM train to the rails of . . . [P&R] did not . . . [have the effect of making him a servant of P&R].

In *Linstead, supra*, the Court said:

> . . . To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. . . .
>
> . . . It was work for which the Chesapeake & Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.

In distinguishing the *Hull* and *Linstead* cases, the Court of Appeals for the Fifth Circuit in *Robertson, supra*, said:

> . . . [T]he evidence was searched out to discover whose work the servant was doing; and the rule was applied accordingly. In Hull's case, it was found that the plaintiff was doing the work of his general employer, in Linstead's case, that he was not, but, on the contrary, was doing the work of another by whom he had, as to the work he was doing; been specially employed. . . .

Other cases dealing with this subject are cited in the briefs. In None of them has the Court departed from the well established rule that the answer to the question as to who was the master of the injured servant at the time of his injury depended upon the facts in each case with respect to who had the supervision, direction and control of the details of the work being done by the servant at the time. Here it is undisputed that Rodicker had elected to take the job with UPT, that the work he was doing was being done for UPT, in the UPT yard, with UPT equipment and under the exclusive supervision, direction and control of UPT. There is nothing in the record to indicate that Illinois Central exercised, or attempted to exercise any supervision or control of this work, or retained any right to supervise, direct or control it. The fact that Rodicker's regular employment (upon which he was not engaged at the time), was with Illinois Central or that his seniority and vacations were determined by his "home road" does not alter these controlling facts. The position of Illinois Central respecting the work being done by Rodicker at the time of his injury was the same as that of the other five railroads whose passenger trains were serviced by UPT.

Upon the undisputed evidence in the record reasonable men could not differ in concluding that, at the time of his injury, Rodicker was the servant of UPT, doing its work, and under its exclusive supervision, direction and control. The trial

court correctly found that there was no factual issue as to this and no evidence capable of supporting a jury finding that, at the time of his injury, Rodicker was working as a servant of Illinois Central or under its supervision, direction or control, and his action in directing a verdict for appellee was correct.

AFFIRMED.

GILLESPIE, P. J., and RODGERS, JONES and BRADY, JJ., CONCUR.

APPENDIX "B".

IN THE SUPREME COURT OF MISSISSIPPI

July 2, 1970

No. 45,849

ROBERT R. RODICKER

versus

ILLINOIS CENTRAL RAILROAD COMPANY

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition for a rehearing filed herein be and the same is hereby denied.

MINUTE BOOK "BP", PAGE 157.

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R. ROBERT SEAVER

Supreme Court of the United States

OCTOBER TERM, 1970

No. 776

ROBERT R. RODICKER,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, AND OPPOSING BRIEF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 776

ROBERT R. RODICKER,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

COMES the Respondent, Illinois Central Railroad Company, replying to Petitioner's Prayer for a Writ of Certiorari and pleads:

A.

With reference to "the question presented" as stated by Petitioner (Page 3):

1st, Respondent denies that at the time of Petitioner's injuries he was an employee of the Illinois Central Railroad Company, entitling him to the coverage of the Federal Employers' Liability Act.

2nd, Respondent denies that Petitioner accurately states the facts as contained in the record, which facts are summarized

and correctly stated by the Mississippi Supreme Court in its opinion. (Petitioner's Brief page 15 "Appendix A".)

3rd, Respondent denies that the record in the trial court presented an issue of fact for the jury.

4th, The undisputed evidence is that at the time of Petitioner's injuries he was an employee of the New Orleans Union Passenger Terminal; he was doing its work and was under its exclusive direction, supervision and control.

B.

With reference to "Reasons for Granting Writ" as stated by Petitioner (p. 7):

1st, Petitioner's first reason is not valid for the reason that Petitioner at the time of his injuries was not an employee of Respondent Railroad. He therefore, has no claim against Respondent under the Federal Employers' Liability Act.

2nd, Petitioner's second reason that because of the three-year statute of limitations he cannot now bring an action against the UPT is without merit. Petitioner has no one to blame but himself and his counsel for ignoring the facts and refusing to follow the law and allowing the statute of limitations to run on any action which he might have brought against the UPT.

3rd, Petitioner misinterprets the cases from this and other courts, which are cited in his Brief. These cases do not support the Petition for Writ of Certiorari.

WHEREFORE, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

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BRIEF OF RESPONDENT.

Because the unanimous opinion of the Mississippi Supreme Court as written by Mr. Justice Smith (Petitioner's Brief page 16 "Appendix A") so succinctly and accurately refutes every argument which Petitioner advances, further Brief by Respondent is probably unnecessary. We confidently rely upon that opinion. The remainder of this Brief will merely amplify and support the decision appealed from, repeating much of Respondent's Brief filed in the Mississippi Supreme Court.

I. STATEMENT OF THE CASE.

Petitioner's Statement of the Case is incomplete and misleading. It does not cover those facts which are material for determination of the question here presented, that is, *whose was the right of supervision and control over Petitioner at the time of his injuries.*

The opinion of the Mississippi Supreme Court accurately summarizes the evidence as contained in the record, which as stated by the Court in its opinion, is undisputed.

A more comprehensive statement of the facts with record references we believe, however, will be beneficial to the Court.

The New Orleans Union Passenger Terminal, hereafter referred to as UPT, *is a railroad.* It was created by an amendment to the Constitution of the State of Louisiana, Article 14, Section 31.3, Act 385 of 1938. This railroad is owned and operated by the City of New Orleans. Its overall operating body is a board of directors. It operates in interstate commerce and is subject to the rules and regulations of the

Interstate Commerce Commission. It has the power to sue and be sued and the right of eminent domain (R. 237-239). The UPT, or the City of New Orleans through it, owns tracks and operates equipment, and the area of its operation is well defined (R. 299). Its employees number about 275 (R. 256). It has its own Book of Rules governing its operating department (R. 249, Ex. 2, Wallace testimony). The yardmen, which included Petitioner, work under an agreement between UPT and the Brotherhood of Railroad Trainmen (R. 243, Ex. 1, Wallace testimony). The chain of authority for the operation of UPT is from C. J. Wallace, the Terminal Manager, whose responsibility is to the Board of Directors, to the trainmaster and yardmaster, and to the engine foreman of each operating crew within the Terminal (R. 240, 250, 288).

Six railroads operate passenger trains in and out of the Passenger Terminal—the KCS, the T&P, the Southern, the Southern Pacific, the L&N, and the Illinois Central (R. 197). Approximately 15 passenger trains per day come into the Terminal from these railroads (R. 291). Upon reaching the Terminal yards these trains, as they are brought in by their own operating crews, become subject to the control of the tower director, who, as an employee of UPT, directs their movement by lining the switches and signals (R. 312). At this point UPT and its switching crews take over in conducting the switching operations within the Terminal.

By agreement between the six railroads and the Brotherhood of Railroad Trainmen the yardmen comprising the switching or operating crews within the Terminal were to come from the rosters of these railroads. Each railroad was allocated a certain number of these jobs on the basis of a quota worked out among them. These jobs were claimed on the basis of seniority,

with the trainmen maintaining their seniority on their home roads. If a trainman's seniority entitled him to a Terminal job regularly, and he remained on a Terminal job for any length of time, he received his vacation from the Terminal, otherwise from his home road (R. 257).

Petitioner, in stating that while working at UPT he remained under the rules and instructions of the Illinois Central, has misquoted the record. The crew of which Petitioner was a member was operating under the "*Rules of the Operating Department of the New Orleans Union Passenger Terminal.*" The UPT in establishing rules for its operating department adopted the rules and instructions of the respective railroads coming into the Terminal with a number of exceptions and additions. Petitioner, therefore, in working on the UPT job at the time of the accident was subject to UPT rules and regulations and not the rules and regulations of Respondent railroad (R. 249).

The members of the operating crews, made up of trainmen from the various railroads, in the performance of their duties received no orders or instructions from the Illinois Central Railroad or from any of the other railroads whose trains run in and out of the Terminal (R. 289).

On any given day a three-man switching crew, such as the crew of which Petitioner was a member, might be made up of trainmen from three separate railroads, all taking their orders and instructions in the performance of their duties from the UPT yardmaster. This was not an arbitrary arrangement of the Terminal but was in accordance with the wishes and the agreement made between UPT and the Brotherhood of Railroad Trainmen (R. 242, Ex. 1, Wallace testimony).

These operating crews made up of yardmen from the various railroads were under the supervision, control and orders of the UPT yardmaster. They did not receive orders from anyone else. (R. 289.)

The Illinois Central was Petitioner's home road. He had worked various jobs in Respondent's freight yards, all of which were separate and distinct from and not within the area of the UPT yard (R. 35). While working these Illinois Central freight jobs the crews performed general switching operations and always under the supervision and control of the Illinois Central yardmaster (R. 38). While working a Terminal job the crews were under the supervision and control of the UPT yardmaster.

The job that Petitioner was working at the time of the accident was Job No. 5, beginning at 11:55 P.M. He obtained this job by virtue of his seniority (R. 41). He reported for duty to the switchmen's shanty in the Terminal yard (R. 42). He was the "helper", the other members of the crew being Engine Foreman L. H. Barnett and Engineer C. E. Kaul (R. 46). Their home road was the Illinois Central. They bid their jobs by virtue of their seniority. The yardmaster was Edward Hornsby, who had been a regular employee of UPT since its inception, April 16, 1954 (R. 285). The record is replete with testimony that Petitioner as the helper in the crew, Kaul as engineer and Barnett as the Engine Foreman all took their orders and instructions from Mr. Hornsby, the UPT yardmaster. This is undisputed. There is no evidence to the contrary. Petitioner, Barnett and Kaul made out "time slips" to UPT (R. 46, Ex. "B").

Kaul had worked Job No. 5 for five or six days, having bid it in a regular job for a period of 120 days. On one occasion he

had worked as a fireman on a Terminal job for a year (R. 180, 181, 185). Barnett had been working Job No. 5 for quite some time (R. 283).

Petitioner testified that he had worked on UPT jobs previously with trainmen from other railroads. Therefore, when he reported for work on Job No. 5 he could very well have found himself working with an engine foreman whose "home road" was a railroad other than IC and an engineer whose "home road" was still another of the railroads (R. 61-62).

The fallacy of Petitioner's argument that he was an IC employee at the time of the accident because the engine foreman's "home road" was IC is apparent.

The method of payment of the wages of these yardmen was worked out between UPT and the six railroads in the most convenient manner. A yardman from either of the six railroads working on a single job or for a few days only on a Terminal job would be paid by his home road, who would then bill the Terminal for reimbursement for the wages so paid. This was to avoid double charging of railroad retirement payments to the yardman. If he continued on a Terminal job beyond a two-week pay period he would then be placed upon the regular Terminal payroll. If the yardman's seniority entitled him to do so he could bid in a Terminal job for a six-month period, the calendar year being divided into two periods of January 1 to June 30 and July 1 to December 31. In that event the yardman would not be subject to being replaced during this period even by someone who might have more seniority (R. 270-283). In either event his wages were paid by UPT, and his duties were the same regardless of whether or not he was working on a Terminal job for one day, for several weeks, or for several months.

The crew on Job No. 5 was operating switch engine No. 3 (R. 52-55). This engine was owned by UPT (R. 287). The duties of the crew working this job consisted of making up and breaking up trains of the railroads coming into the Terminal, putting the cars through the Terminal washer and conducting general switching operations of cars and trains of these railroads, all under the supervision, control and direction of UPT yardmaster Hornsby. Although there was work carried over from one shift to the next, Job No. 5 generally handled five trains, one each from TCP, KCS, L&N, S.P., and IC (R. 179-180, 286-295). Petitioner himself testified that between 10:55 P.M., when he began his tour of duty, and 2:30 A.M., when the accident occurred, the crew of which he was a member switched an L&N, a Southern Pacific, and an Illinois Central train, the City of New Orleans, which train they were switching at the time of the accident. He did not remember if there were others (R. 56). This was done under the supervision and orders of Mr. Hornsby, the UPT yardmaster of ten years service (R. 178, 285).

Mr. Hornsby reported the accident to UPT who filed a report with the Interstate Commerce Commission in accordance with the regulations for reporting injuries to employees (R. 253-254, Ex. 3, Wallace testimony). Respondent made no such report.

The conclusion of the Mississippi Supreme Court on this undisputed evidence was:

> ". . .reasonable men could not differ in concluding that, at the time of his injury, Rodicker was the servant of UPT, doing its work, and under its exclusive supervision, direction and control."

II. RIGHT OF SUPERVISION AND CONTROL IS THE DETERMINING FACTOR.

In the case of *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480, this Court spelled out the "loaned servant" doctrine. That case did not involve FELA, but the rule announced therein has been cited and followed in Federal Employers' Liability Act cases for fifty years.

The Mississippi Supreme Court in *St. Louis-San Francisco Railway Company v. Porter*, 211 So.2d 530 (Miss. 1968) followed the rule laid down in the *Standard Oil* case, citing also *Hull v. Philadelphia and Reading Railway Company*, 252 U.S. 475, 40 S.Ct. 358, 64 L.Ed. 670, *Linstead v. Chesapeake & Ohio Railway Company*, 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453, and *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed.2d 709, along with *Robertson v. Yazoo & M.V.R. Company*, 159 F.2d 31 (5th Cir. 1947) and cases from other jurisdictions.

The Mississippi Supreme Court in the case at bar followed the same authorities, so it cannot be said that Petitioner's cause of action has been aborted by the Supreme Court of Mississippi. Unquestionably, the decision of the Mississippi Supreme Court in this and other cases decided by the Court is completely consistent with the "loaned servant" doctrine as interpreted and applied by the decisions of this Court and the Courts of Appeal.

III. PETITIONER'S POSITION IS NOT SUPPORTED BY THE AUTHORITIES.

Petitioner says that "the Supreme Court of Mississippi has always given a markedly restricted interpretation to the coverage of the Federal Employers' Liability Act as to the questions of employment in interstate commerce regardless of Federal decisions to the contrary". This statement is not borne out by the decisions of the Mississippi Supreme Court.

In *Gulf M. & N.R. Co. v. Myer*, 110 So. 444 (Miss. 1926) cited by Petitioner in his Brief, the evidence was that Plaintiff "at the time of the injury was simply riding on a pass as an employee without any known duty to perform while riding upon that train,. . ." Under such circumstances, the Mississippi Supreme Court said that Plaintiff could not "by a stretch of the imagination be held to be engaged in that which furthers the business of carrying on interstate commerce".

In *Wallace v. St. Louis-San Francisco Railway Company*, 120 So.2d 131, (Miss. 1960), which case Petitioner cites as eroding the principles of FELA, the uncontradicted evidence was that Plaintiff at the time of his injuries had completed his tour of duty at 9:50 A.M. and had gone to a nearby hotel where he had registered, eaten breakfast and read the morning paper. At 12:15 P.M. he decided to return to the washroom in the railroad yard to shave. In climbing over a cut of cars, he slipped and fell. The Mississippi Supreme Court held that Plaintiff was not performing any duties whatever in furtherance of interstate commerce, and in following the opinions of Judge Learned Hand in *Young v. New York N. H. & H.R. Co.*, (2nd Cir. 1934), 74 F.2d 251, and *Vostyn v. Delaware L. & W.R. Co.*, 160 F.2d

15 (2nd Cir. 1947) said "that any activity undertaken by an employee for a private purpose is certainly not within his employment".

In *Hill v. Gulf Mobile and Ohio Railroad Company*, 120 So.2d 157 (Miss. 1960), which case is also cited as an erosion of the principles of FELA, the facts were that the Plaintiff had completed his tour of duty "about 11:10 to 11:20 P.M. He went to his boarding house to bathe, dress and then go downtown to a cafe to eat". While at the boarding house, he was injured in a fight with a fellow employee as a result of an argument growing out of an interpretation of the Brotherhood of Trainmen Seniority Rules. In upholding a directed verdict in favor of defendant railroad, the Mississippi Supreme Court said:

> "Plaintiff was not engaged in any work for the railroad company at the time. Neither was he engaged in any business in interstate commerce for the railroad company."

Counsel for Petitioner tried the *Wallace* and the *Hill* cases, and he should recognize the correctness of these decisions. Certainly they do not in any way erode the principles of the Federal Employers' Liability Act. The Mississippi Supreme Court in these cases has done nothing more than follow the rule as stated by Judge Learned Hand and as stated in other cases from the federal courts, which are cited in the *Wallace* case.

Petitioner relies upon the case of *Terminal Ass'n of St. Louis v. FitzJohn*, 165 F.2d 473, 1 ALR 2d 290, (8th Cir. 1948). The evidence which was determinative of the decision in that case is omitted from the statement of the facts as set forth in Petitioner's Brief. The facts were as follows:

From the time of the establishment of the plant to about two months prior to the accident defendant had sent an engine and switch crew into the plant to do the necessary switching. A charge of $3.47 was made for each movement of cars within the plant. This arrangement proved unsatisfactory because defendant's engine and crew were not always available when needed, and the expense was considered undesirable.

An arrangement was worked out between the Government, the defendant railroad and the Railroad Brotherhood, whereby the Government furnished a light switch engine which remained in the plant available at all times. The defendant railroad furnished the crew to man the engine. No one other than employees of defendant railroad could operate equipment on defendant's tracks, so no one other than employees of defendant railroad could constitute the crew conducting the switching operations within the plant. Movement of cars from one section of the plant to another necessitated use of defendant's mainline track and required permission from defendant's yardmaster. The switch crew was subject to the same rules and working conditions applicable to defendant's other employees. The Court said:

> "This arrangement, as we view it, contemplated no change in the employment status of the Plaintiff or of other members of the switching crew and no deprivation of their rights or benefits as employees of the defendants. . ." "The conduct of the plant officials in directing the crew was the conduct which would necessarily be followed in any industry requiring switching by any railroad."

The Defendant railroad in *FitzJohn* maintained some degree of control and supervision over the operation of the switchcrew, whereas Respondent in this case maintained no

control and supervision whatever over Petitioner and the crew of which he was a member. In fact, Petitioner readily admitted that the switchcrew of which he was a member received all its orders and directions from the UPT yardmaster. Thus, the Mississippi Supreme Court distinguished *Fitzjohn* from the case at bar.

The case of *Missouri-Kansas-Texas Railway Company v. Hearson*, 422 F.2d 1037 (10th Cir. 1970) is cited by Petitioner as supporting his proposition that as a matter of law, he was an employee of Respondent at the time of this injury. In so doing, Petitioner ignores the facts which were determinative of the decision in that case, that is, the right of supervision and control. Quoting from that opinion:

> "The record is replete with testimony to the effect that the railroad controlled the significant parts of the car-cleaning operation just as it did before it contracted with Souter and just as it did after Souter terminated the contract shortly after appellee's injury."

> "It was the railroad that determined whether the cars were cleaned properly and whether they should be sent back for recleaning. Testimony was that if the railroad's yardmaster came over to appellee and gave him instructions or told him to sweep out the corners, appellee should and would have complied."

Thus, the distinction between *Hearson* and the case at bar is readily apparent.

Petitioner says that the trial court erroneously followed the case of *Shaw v. Monessen Southwestern Ry. Co.*, 200 F.2d 841, (3rd Cir. 1953), and cites the case of *Valo v. Monessen*

Southwestern Railway Co., 407 F.2d 1400 (3rd Cir. 1968), implying that the *Valo* case overrules the *Shaw* case. The opinion in the *Shaw* case is misinterpreted. The decision there was not on the basis of whether or not Shaw was or was not engaged in interstate commerce as contended, but the determining factor was whose employee was Shaw, that is, under whose control and supervision he was working, and whose work was being done at the time he was injured. Quoting from that case:

> "* * * 'It is agreed that an issue to be decided by the Court is whether or not the plaintiff was engaged in interstate commerce while working for the Monessen Southwestern Railway Company, a common carrier, *or was engaged as an employee of the Pittsburgh Steel Company* in their open hearth department.' This is the sole issue on this appeal." (Emphasis ours.)

In citing *Linstead* and *Hull* the court in listing the factors to be considered, said:

> "* * * When these considerations are added together we find them conclusive *that the plaintiff was, on the day of his injury, an employee of Pittsburgh Steel* from whom he has received compensation under the Pennsylvania Compensation Act." (Emphasis ours.)

The issue in *Valo* was the same as in *Shaw*, that is, whether or not "Valo was the employee of Monessen at the time of the injury." The court said:

> "* * * 'The primary factor to be considered is whether or not the railroad or the steel company had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured.' "

* * * * *

> "The crucial factor is who had the authority to give Valo detailed directions in the performance of his work (Shaw v. Monessen Southwestern Ry. Co., supra). Valo testified that, although a Pittsburgh Steel Company employee had authority to tell him how many loaded 'buggies' to take from the 'stripper' area and where to put them, the Railroad yardmaster was his supervisor."

See Footnotes 407 F.2d 1404 for testimony of Valo in this regard.

In *Valo* the court said that the proof was that "the railroad yardmaster was his supervisor". "Evidence of this factor was absent in the Shaw decision. That opinion is sound law on its own facts." Thus, Petitioner's statement that "the same court that decided Shaw had before it a case identical on the facts" in *Valo* is incorrect.

Petitioner cites the case of *Baker v. Texas & Pacific Ry. Co.*, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed.2d 755, as supporting his position. Again he ignores the facts which make the *Baker* case clearly distinguishable. This Court in the *Baker* case in citing *Linstead* said that "Each case must be decided on its own peculiar facts". Certiorari was granted, the Court holding that a jury question was presented because:

> "* * * Here the petitioners introduced evidence tending to prove that the grouting work was part of the maintenance task of the railroad; that the road furnished the materials to be pumped into the roadbed; *and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed* by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture." (Emphasis ours.)

Petitioner relies upon the case of *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799. *Sinkler* is completely misinterpreted. In that case *Plaintiff was employed as a cook by Defendant railroad. He was injured while in the performance of his duties for his employer*, when the Belt Railway switching crew caused a car being switched by it to collide with the car in which Plaintiff was working. The situation in this case is entirely different from that in *Sinkler*, because Petitioner here was not engaged in and about the duties of Illinois Central. He was performing the work of UPT and was under its control and supervision at the time of the accident. The rational of *Sinkler* is that Plaintiff as an employee of Missouri Pacific was entitled to the coverage of FELA even though his injuries were caused by a third party, the Belt Railway, which was engaged in switching Missouri Pacific trains about the Terminal area. No question is presented in *Sinkler* as to the employment status of Plaintiff with Missouri Pacific, that being an admitted fact, presupposing supervision and control of Plaintiff's activities by Missouri Pacific. All that this court held in *Sinkler* was that "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA," insofar as its own employees are concerned.

The question presented in the case at bar is whether or not Petitioner was an employee of Respondent railroad, a question not at issue in *Sinkler*.

In the case of *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (1965) the Third Circuit Court of Appeals in commenting upon the *Sinkler* case, and the basis of the decision there, said:

"* * * * Sinkler v. Missouri Pacific Railroad Co., supra, heavily relied on by the plaintiff, is inapposite. That case did not consider the question of who is an 'employee' of the railroad for the purposes of the Act, but rather was concerned with *who are 'agents' of the railroad for determining liability to one clearly an 'employee'.*" (Emphasis ours.)

Thus, the distinction between *Sinkler* and the case at bar is apparent.

Petitioner's "Statement of the Case" contains certain factual situations from the record, none of which contain any evidence whatever tending to prove what the courts have held repeatedly in requisite for establishing an employer-employee relationship. They have no bearing whatever upon the supervision and control of Petitioner and his crew at the time of the accident. The evidence is uncontradicted. UPT had the right of control and supervision; it was exercised by and through yardmaster Hornaby. There was no issue of fact for the jury.

IV. CERTIORARI DENIED IN SIMILAR CASES.

This court has denied certiorari in a number of cases wherein the evidence was uncontradicted as here, that the control and supervision was not in the Respondent railroad.

The case of *Quirk v. New York C. & St.L.R. Co.*, 189 F.2d 97 (7th Cir. 1951) Cert. denied, 342 U.S. 871, 72 S.Ct. 105, 96 L.Ed. 655 was an action brought under FELA. The question presented was whether or not the decedent was engaged in interstate commerce within the scope of his employment for Respondent railroad at the time of the accident. In affirming the trial court which had set aside a jury verdict and dismissed the action, the court said:

"There is no dispute as to any material facts, and we agree with the court below that the question for decision is one of law."

The case of *Yarborn v. Reading Co., et al.* 396 F.2d 941, (3rd Cir. 1968) Cert. denied, 393 U.S. 1027, 89 S.Ct. 637, 21 L.Ed.2d 569, likewise was an action brought under FELA, the question at issue being whether or not Plaintiff was under the direction, control and supervision of Respondent railroad so as to make him its employee under the Federal Employers' Liability Act. In affirming a directed verdict in favor of Respondent railroad, the court said:

"The question may be taken from the jury if reasonable men could not reach differing conclusions on the issue."

Where the direction, control and supervision was not in Respondent railroad, the Third Circuit Court of Appeals in *Dell'Occhio v. Pennsylvania Railroad Company*, 233 F.2d 2, (1956) Cert. denied, 352 U.S. 909, 77 S.Ct. 146, 1 L.Ed.2d 117, affirmed a directed verdict in favor of Respondent railroad in an action brought under FELA, the court holding that there was no issue of fact for the jury.

In *Fauvell v. Missouri Pacific Railroad Company*, 347 F.2d 233, (8th Cir. 1965) Cert. denied, 382 U.S. 907, 86 S.Ct. 242, 15 L.Ed.2d 159, the Court affirmed summary judgment in favor of the Respondent railroad. The trial court had held that Plaintiff's decedent was not under the direction, control and supervision of the railroad and therefore, not its employee under the Federal Employers' Liability Act.

Also, see *Valentine v. The Southern Coast Corporation and Southern Pacific Company*, 334 F.2d 244, (5th Cir. 1963)

where the court affirmed summary judgment granted by the trial court in favor of Respondent railroad, it clearly appearing that there were no disputed facts concerning Plaintiff's employment status, the Plaintiff not being subject to the direction, control and supervision of Southern Pacific. The court said:

> "If it appears that reasonable men could not reach differing conclusions on that issue, the question should not be submitted to the jury."

Petitioner's Brief omits the material facts and misinterprets the cases dealing with the question presented in this case. His position is not supported by any authority.

CONCLUSION.

Respondent respectfully submits that, as repeatedly pointed out, the right of direction, control and supervision is the all-important and determining factor. The evidence is conclusive, in fact, undisputed as stated by the Mississippi Supreme Court, that Petitioner and the crew of which he was a member, were under the full and complete direction, control and supervision of UPT, and that at the time of the accident was performing the work of UPT. Petitioner, therefore, had become pro hac vice the employee of UPT, and the decision of the Mississippi Supreme Court was unquestionably correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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This is to certify that copies of this brief have been served on opposing counsel on this the _____ day of October, 1970.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED

E. ROBERT SEAVER, CLERK

Supreme Court of the United States

October Term, 1970

No. 776

ROBERT R. BODICKER,
Petitioner

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 776

ROBERT R. RODICKER,
Petitioner

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioner prays that the court grant a rehearing on the Petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi which Petition was denied by this court on January 18, 1971, and as grounds therefor would show that the senior justice of the court, Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Brennan joined, dissented with the majority and thought certiorari should be granted. The written dissent attached hereto as Appendix "A", expresses the concern that has been typical of the United States Supreme Court in protecting the constitutional and statutory rights of employees under the Federal Employers' Liability Act for which the court has so valiantly stood since the first case was presented to it under the Act.

Congress has just registered its continuing deep concern for the safety of railroad employees in the United States in the passage of the "Federal Railroad Safety Act of 1970", Public Law 91-458, 91st Congress §1933, 84 Statutes 971. This bill was passed on October 16, 1970 after Petitioner filed his Petition for a Writ of Certiorari. That Act authorizes the United States Government to correct unsafe working conditions on American railroads, conditions which the railroads failed to voluntarily correct through their many years of operation, and covers conditions which we believe caused Petitioner's serious injuries.

Without reflecting on the Supreme Court Judges of the State of Mississippi or the trial judge, their minds had been molded in accordance with the principles laid down in the common law, and they find it difficult to go beyond that. In the case of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, this court said:

> "The law was enacted because Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employers negligence."

In the case of *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 63 S.Ct. 1062, the court said:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166. It is part and parcel of the remedy afforded

> railroad workers under the Employers' Liability Act. * * * * * To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The burden of our original brief was to point out the laws that supported our contentions in this case. However, by the dissenting opinion of Justice Black, our attention has been called to the fact that the lower courts have not followed the injunction of the United States Supreme Court, and the employees of the railroads in the state of Mississippi are not receiving the protection of this Act.

Wherefore, the Petitioner prays for a rehearing on his Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF THE UNITED STATES

October Term, 1970

ROBERT R. RODICKER
v.
ILLINOIS CENTRAL RAILROAD COMPANY

On Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi

No. 776. Decided January 18, 1971

The petition for writ of certiorari is denied.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

This is a tragic case in which a twenty-three-year-old railroad worker was permanently and totally disabled while performing his duties. He has been denied his right to recover damages by what I believe was the gross error of the Mississippi Supreme Court in depriving him of his constitutional right to a jury trial.

Petitioner Robert Rodicker, a man with an eighth-grade education, has earned his living doing manual labor for respondent Illinois Central Railroad since the age of 18. On September 18, 1964, Rodicker was working a switch en-

gine with two other Illinois Central Railroad employees coupling an Illinois Central car to a train at the Union Passenger Terminal in New Orleans. As the engine backed up, it spewed out a shower of sparks, covering Rodicker with fire and burning his back and neck. He leaned away from the engine's steps to save himself from the sparks and smashed into a negligently placed steel garbage container that knocked him to the tracks unconscious. He brought suit against respondent under the Federal Employer's Liability Act, urging that his injury was negligently caused by the engine's excessive sparks and the dangerous placement of the steel garbage containers. The Mississippi Supreme Court affirmed a judgment directing a verdict for the railroad. That court held that as a matter of law petitioner was an employee of the Union Passenger Terminal and not the Illinois Central at the time of this terrible accident. I cannot understand the Court's refusal to grant certiorari.

Respondent had made an agreement with the Union Passenger Terminal whereby the latter used Illinois Central employees and those of other railroads as crews to switch the railroads' cars when they entered the terminal. Petitioner was working on such a crew when he was injured. He had an Illinois Central employee number and was being paid by check drawn on the Illinois Central. He regularly applied to the Illinois Central for vacation time and received vacation pay from it. And of course he was actually coupling an Illinois Central car at the time of the injury.

On this record petitioner was entitled to have a jury determine whether he should recover from the Illinois Central. See, *e.g.*, *Sinkler v. Missouri Pacific Railroad*, 356

U.S. 326 (1[illegible] *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Terminal Railroad Association of St. Louis v. Fitzjohn*, 165 F.2d 473 (CA8 1948). Today the Court deprives petitioner of his right to a jury trial and frustrates the plan of Congress to provide a remedy for railroad employees injured by their employers' negligence.

I think it is of paramount importance that the purpose of Congress to protect people like petitioner should not be frustrated by the will of judges. I would grant certiorari and reverse the judgment of the court below.